APPENDIX

THE MISSOURI SUPREME COURT

THE CONLON GROUP *Respondent and Cross-Appellant* *v.* THE CITY OF ST. LOUIS *Appellant and Cross-Respondent*	St. Louis City Circuit Court No. 962-07977 Missouri Court of Appeals, Eastern District, No. 73789 Missouri Supreme Court No.__

APPLICATION FOR TRANSFER

This appeal should be transferred for the following reasons:

1. The opinion of the Court of Appeals is contrary to opinions in *U-Haul of Eastern Missouri, Inc. v. City of St. Louis*, 855 S.W.2d 424 (Mo.App. 1993), *Dempsey v. Boys Club of City of St. Louis*, 558 S.W.2d 262 (Mo.App. 1977), and *Lafayette Park Baptist Church v. Scott*, 553 S.W.2d 856 (Mo.App. 1977); and *Howard v. Nicholson*, 556 S.W.2d 477 (Mo.App. 1977). The former three opinions hold that there are limits to the extent to which the owner of property may be compelled to bear the cost of improving the general welfare and that governmental action which prevents the effective use of private property becomes confiscation violative of Mo.Const. Art. 1, §26. The latter opinion recognizes the doctrine of commercial frustration-under which the occurrence of an unforeseen event not under the control of either party which destroys or nearly destroys the object of a contract excuses further performance—as a component of Missouri contract law.

The parties to the present case entered into a redevelopment agreement under which The Conlon Group, Inc., was obliged to

renovate certain commercial real estate in St. Louis and was to receive consideration for the performance of its promise. The parties contemplated construction costs of $2,700,000.00. Structural problems which had not been foreseen by either party were discovered soon after redevelopment had begun, portending actual construction costs of some $30,000,000.00 and rendering performance of the contract economically impossible for the redevelopers The City of St. Louis refused to permit demolition of the buildings in lieu of rehabilitation under the contract.

The Circuit Court found that the city's refusal to permit demolition constituted a taking of private property and awarded damages under the doctrine of inverse condemnation. The Court of Appeals reversed, holding that "a redevelopment agreement is no different from any other contract" and that "[t]he doctrine of commercial frustration is inapplicable here."

2. The opinion of the Court of Appeals is contrary to opinions in *State ex rel. Chiavola v. Village of Oakwood*, 931 S.W.2d 819 (Mo.App. 1996), *Schnuck Markets, Inc. v. City of Bridgeton*, 895 S.W.2d 163 (Mo.App. 1993), and *Barket v. City of Louis*, 903 S.W.2d 269 (Mo.App. E.D. 1995). Each of those opinions holds that government action which limits the use of private property or deprives a property owner of all economically viable use of his property constitutes a taking and necessitates compensation of the property owner. The present opinion approves a city's insistence upon performance of the terms of a redevelopment agreement despite unforeseen conditions which rendered performance economically impossible and hence precluded the owner from viable use of his property.

3. This appeal should be transferred for reexamination of existing law regarding the contract doctrine of commercial frustration, the doctrine of inverse condemnation, and the intersection of those doctrines which gives rise to the following question: When an unforeseen event renders performance of a

redevelopment agreement between a government and a property owner impossible for the property owner, and the government's insistence upon performance effectively deprives the property owner of the use of his property, does the doctrine of commercial frustration apply so that insistence upon performance may constitute a taking? In this case, the trial court found that a taking had occurred and awarded damages. The Court of Appeals reversed, holding that the doctrine of commercial frustration had no application despite a tenfold increase in the cost of performance which rendered compliance economically impossible for the property owner.

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